power, where the tax is not laid upon the contracts made by the State in the exercise of that power, or upon the amounts payable thereunder, but is laid upon the result of distinct transactions by private owners, it must clearly appear that a substantial burden upon the borrowing power of the State would actually be imposed. But we have nothing but assertion and conjecture. The assertion might as easily be made as to the necessity of the complete immunity of such securities from federal taxation in the case of estate taxes, and, if mere conjecture were sufficient as to the possibility of a burden being cast by the tax on the essential authority of the State, it could be as readily entertained in the one case as in the other. Indeed, the existence of the illegal burden might be more easily assumed in the case of the estate tax, where the entire value of the securities, and not merely gains on sales, are taken into the reckoning in determining the amount of the tax.

There is, however, an outstanding fact, more important than any possible conjecture. That fact is found in uniform and long-established practice. This practice clearly indicates that neither the Federal Government nor the States have found a tax on the profits of the sales of their securities to be a burden on their power to borrow money. So far as we are advised, the Federal Government has not at any time deemed it to be necessary to exempt from taxation the profits realized by owners on the sale of its obligations, with the exception, recently made, of short-term Treasury bills issued on a discount basis and payable without interest.[5]

[5]In Gray *v.* Darlington, 15 Wall. 63, where the question related to the federal tax under the Act of March 2, 1867, 14 Stat. 477, 478, upon the profits on the sale of bonds of the United States, the point of the decision was that the statute applied only to *annual* "gains, profits and income" and did not extend to the increase in value of the bonds which had taken place in several prior years and was realized in the preceding year. But it was not questioned that annual gains or profits on the sale of government bonds were taxed by the Act. See Hays *v.* Gauley Mountain Coal Co., 247 U. S. 189, 191.

In O. D. 729, Cumulative Bulletin No. 3, July-December, 1920, pp. 123, 124, the Treasury Department ruled: "In the case of Treasury certificates of indebtedness which are offered by the Government at par and accrued interest and not at a discount, only the coupon interest can be considered exempt from normal tax, and from surtax to the extent provided by the act approved September 24, 1917. Where such certificates are subsequently purchased at a discount, the difference between the purchase price and the par value of the

Such profits are included in the general phrase "gains, profits and income" from "sales, or dealings in property," in the Act under consideration. And we understand that under all federal income tax acts, these or similar words have been construed invariably by the administrative authorities as including profits derived from the sale of state and municipal bonds. The present case appears to be the first in which the tax in this respect has been assailed. No State has ever appeared at the Bar of this Court to complain of this federal tax, and it is not without significance that in the pres-

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certificates received at maturity is profit subject to both normal tax and surtax. The subscriber for Treasury certificates who sells them at a discount sustains a deductible loss, which is the difference between the par value of the certificates and the selling price. Any gain or loss on the sale of Treasury certificates of indebtedness prior to maturity should be determined in accordance with section 202 of the Revenue Act of 1918."

In the 71st Congress, 1st session, an amendment was proposed to section 5 of the Second Liberty Bond Act as amended (40 Stat. 290, U. S. C., Tit. 31, sec. 754), providing for the issue of Treasury bills "on a discount basis and payable at maturity without interest" and that (subdivision (b)) all certificates of indebtedness and treasury bills issued thereunder ~~should be exempt~~ "both as to principal and interest, *and any gain from the sale or other disposition thereof shall be exempt* from all taxation (except estate or inheritance taxes) now or hereafter imposed by the United States, or by any local taxing authority; *and no loss from the sale or other disposition thereof shall be allowed as a deduction, or otherwise recognized, for the purposes of any tax now or hereafter imposed by the United States or any of its possessions.*". H. R. 1648, 71st Cong., 1st sess. The committee reports in the Senate and House of Representatives state that the amendment, in relation to both certificates of indebtedness and the new Treasury bills, "provides that gain from the sale of either shall be tax exempt, with the necessary supplementary provision that any loss shall not be recognized. Inasmuch as these are short-term obligations, any advance in price will as a practical matter represent nothing more than interest." 71st Cong., 1st sess., H. R. Rep. No. 13, Sen. Rep. No. 9. The words above italicized were, however, omitted in the act as passed. Act of June 17, 1929, c. 26, 46 Stat. 19, 20. By Act of June 7, 1930 (c. 512, 46 Stat. 775), a similar provision as to tax on profits on sales, but limited to the short-term Treasury bills issued at a discount, was enacted. The committee report in the House of Representatives stated that the reason for this enactment was found in the special nature of such Treasury bills. 71st Cong., 2d sess., H. R. Rep. Nos. 1609 and 1759. Aside from these Treasury bills, the federal tax on profits on sales of federal securities has not been changed.

ent instance the States of New York and Massachusetts do appear here as *amici curiae* in defense of the tax.[6]

The history of income tax legislation is persuasive, if not controlling, upon the question of practical effect. *Plummer* v. *Coler*, *supra*, (p. 137, 138). Before the power of the Congress to lay the excise tax in question can be denied in the view that it imposes a burden upon the States' borrowing power, it must appear that the burden is real, not imaginary; substantial, not negligible. We find no basis for that conclusion, or any warrant for implying a constitutional restriction to defeat the tax.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[6]Undoubtedly each of these States has in view the circumstance that it subjects to its own income taxation the gains derived from the sale of federal securities, and it does not desire, in the absence of an applicable legislative restriction, to be deprived of that source of revenue as a corollary of a decision against the power of the Federal Government to tax the gains derived from the sale of state securities. The State of New York disavows any claim that "the tax in question has any appreciable tendency to burden its fiscal operations" or those of its municipalities. The State of Massachusetts contends that: "1. The non-discriminatory taxation of all gains derived from the use of business knowledge and of human ingenuity in dealings in intangible property can have no material effect to impair the ability of a government to issue its bonds and obligations, even if gains from the sale of such bonds are subjected to the tax. 2. The history of the exemption of state instrumentalities from Federal taxation and of the exemption of Federal instrumentalities from state taxation reveals that the doctrine of exemption has protected governmental obligations only from taxation of the principal amount of such obligations and of the stated interest upon such obligations."